FILED
FEB 4 1983
ALEXANDER L. STEVAS,
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No. 82-[illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TRANSPORTATION MANAGEMENT CORP.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF THE COUNCIL ON LABOR LAW EQUALITY AS AMICUS CURIAE SUPPORTING THE VIEWS OF RESPONDENT

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BRIEF OF THE COUNCIL ON LABOR LAW EQUALITY AS AMICUS CURIAE SUPPORTING THE VIEWS OF RESPONDENT

INTEREST OF AMICUS CURIAE

The Council on Labor Law Equality ("COLLE") is a national association of large and small employers formed to monitor the activities of the National Labor Relations Board and related developments under the National Labor Relations Act and to provide support to employer interests on those issues which affect a broad section of industry. COLLE was formed in recognition of the need for a specialized and continuing business community effort to provide assistance in the review of NLRB and court decisions in order to maintain a balanced approach in the formation and interpretation of national labor policy. This brief amicus curiae is filed with the consent of the parties as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

This case calls into question the degree to which union activism may operate to insulate an incompetent or disobedient employee from discharge by a private corporation. At stake are two competing interests of the National Labor Relations Act: the right of an employee to participate freely and without discrimination in union activities;[1] and the right of an employer to discipline or discharge an employee for cause.[2] These interests collide when a union activist is discharged for legitimate business reasons in what has become known as a "dual motive" or "mixed motive" discharge.

The practical standard by which the NLRA's competing interests are reconciled is found in an evidentiary test intended to guide the fact-finder in reaching an appropriate result. When the General Counsel for the National Labor Relations Board brings an improper discharge case against an employer who had proper business reasons for terminating an employee, the record invariably discloses "good" and "bad" reasons for the discharge. Because the text of the Act does not identify the degree of anti-union animus necessary to violate its prohibition against union-oriented discrimination, the Board and the circuit courts have fashioned a variety of tests for gauging the employer's true motive in effecting the discharge.

The Board's test has evolved through a history of heated debate, questionable application, congressional modification

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[1] 29 U.S.C. §158(a)(3) provides, as pertinent, "It shall be an unfair labor practice for an employer—by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization...."

[2] 29 U.S.C. §160(c) provides, as pertinent, "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

and conflict among the circuit courts. As articulated in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1038 (1980), *enf'd.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 982 (1982), the Board believes that once the General Counsel has made a prima facie showing sufficient to support the inference that protected activities constituted a motivating factor for the discharge, the burden shifts to the employer to demonstrate that the discharge would have resulted without regard to the employee's union-oriented activities. All that is necessary to shift the burden is proof that the protected activity was "a motivating factor" in the discharge; the evidence required to shift the burden is the same qauntum of proof required to sustain reinstatement. The Board contends that this test is consistent with the guidelines established in a related context by *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).

The court below accepted *Wright Line* to the point at which the employer must come forward to combat the General Counsel's prima facie case. At that point, the employer must *produce* evidence to *neutralize* the inference of reliance upon protected activities; but, according to the court, the General Counsel continues to bear the burden of proof: "While this Court has upheld the Board's practice of imposing upon the Company the burden of *neutralizing* the implication of sufficient anti-union motive arising from the General Counsel's *prima facie* case, it has rejected both explicitly and implicitly any effort by the Board to impose a *greater* burden that this upon the Company, as outside the Board's statutory authority." *NLRB v. Transportation Management Corp.*, 674 F.2d 130, 131 (1st Cir. 1982) (per curiam) (footnote and citations omitted) (emphasis in original).

The *Wright Line* test inextricably intertwines substantive issues—the degree of anti-union animus necessary to taint the discharge—with procedural issues—the shifting burden of

proof. While the First Circuit's test correctly placed the ultimate burden of proof on the General Counsel in accordance with the requirements of the NLRA, we believe that both the Board and the court below have misread *Mt. Healthy* and failed to take cognizance of the line of authorities culminating with *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), in failing to distinquish between the nature of the showing necessary to compel the employer to come forward with evidence neutralizing the inference of anti-union animus and the General Counsel's ultimate burden to justify a reinstatement order.[3]

Thus, in our view, the issue presented in this case cannot be resolved in a meaningful fashion unless it is divided into two components: (1) whether the quantum of evidence necessary to shift the burden is equal to the quantum necessary to justify reinstatement; and (2) whether the burden thus shifted is a burden of production or one of persuasion.

Under this mode of analysis, we will demonstrate that the correct test is as follows:

In a mixed motive discharge case, the General Counsel should have the burden of proving that the employee's union related activities represented "a motivating factor" in his discharge. If the trier of fact is satisfied that this burden has been sustained, it should require the employer to produce evidence to demonstrate that the employee was discharged for a legitimate business reason. If the employer does so, the

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[3] Throughout this brief, we use the term "reinstatement" to mean a Board finding that the employer engaged in an "unfair labor practice." While this is intended to promote clarity on the facts of this case, we acknowledge that reinstatement is not the sole remedy available to the Board upon the finding of an unfair labor practice. In some cases, this finding may warrant other relief such as back pay or a cease and desist order. In others, the finding may not justify reinstatement due to intervening events.

General Counsel must prove that the employer's reliance on protected activities was the *dominant* reason for the discharge. Because the burden of proof remains with the General Counsel throughout the proceeding, reinstatement is inappropriate when the respective proof is in equipoise at the close of evidence.

This standard is warranted by the legislative history of the NLRA and decisions of this Court and represents the appropriate mense point in reconciling conflicting policies of the Act in an atmosphere of industrial peace and harmony.

ARGUMENT

I.

THE HISTORICAL EVOLUTION OF THE *WRIGHT LINE* TEST DEMONSTRATES THAT IT WAS BASED UPON AN ERRONEOUS READING OF THE LEGISLATIVE HISTORY OF THE TAFT-HARTLEY ACT AND A MISAPPLICATION OF THIS COURT'S DECISIONS IN RELATED AREAS

A. The Requirement of Anti-Union Animus Under the NLRA

"It should be emphasized that the right to terminate a contract of employment is a constitutional right of the utmost importance."[4] Thus, in one of its earliest reviews of the Act, this Court recognized that the NLRA "does not interfere with the normal exercise of the right of the employer to select its employees or discharge them."[5] This preliminary consideration is consistent with both the legislative history of the Act and this Court's focus on the intent of the employer as the critical factor in determining the propriety of a discharge.

In the legislative history surrounding the development of the Wagner Act, Congress repeatedly stressed that Section 8(a)(3) was not intended to abridge the common law "right of employers to select their own employees or to discharge them."[6] The gist of the Act's protection proscribed reliance

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[4] *NLRB* v. *Citizen-News Co.*, 134 F.2d 970, 973 (9th Cir. 1943); *see NLRB* v. *Standard Coil Products Co.*, 224 F.2d 465, 470 (1st Cir.), *cert. denied*, 350 U.S. 902 (1955) ("It is well accepted law that an employer may discharge an employee for any reason, reasonable or unreasonable, so long as it is not a reason prohibited by the Act").

[5] *NLRB* v. *Jones & Laughlin Steel Corp.*, 30 U.S. 1, 45-46 (1937).

[6] H.R. Rep. No. 1147, 74th Cong., 1st Sess. 19 (1935); *see also* H Rep. No. 573, 74th Cong., 1st Sess. 11 (1935) ("Of course nothing in

(footnote continued on following page)

upon a forbidden, union-oriented reason for the discharge. Accordingly, this Court has recognized that "[i]t is the 'true purpose' or 'real motive' in hiring and firing that constitutes the test."[7]

In theory, Congress intended to protect the employer's right to maintain an efficient and productive work force by permitting employee discharges except when the termination was motivated by the employer's anti-union animus. In practice, the Board immediately began to cast asunder the congressional objective by authorizing reinstatement whenever the employee's protected activities played any role, however small, in the discharge decision. Thus, the Board believed that "so long as one of the grounds for the discharge was discriminatory, it is immaterial that additional considerations may have lent weight to the [employer's discharge] decision."[8]

Two decisions illustrate the Board's practices during this period. In *Wyman-Gordon Co.*, 62 NLRB 561 (1945), *enforc-*

(footnote continued from preceding page)

the bill prevents an employer from discharging a man for incompetence; from advancing him for special aptitude, or from demoting him for failure to perform"); 78 Cong. Rec. 10560 (1934) (remarks of Sen. Walsh) ("An employer is not prevented from discharging any employee who lacks skill or ability, nor is he required to hire an incompetent man.").

[7] *Local 357, Int'l Broth'd of Teamsters* v. *NLRB*, 365 U.S. 667, 675 (1961); *see also Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 42-44 (1954) ("That Congress intended the employer's purpose in discriminating to be controlling is clear"); *Associated Press* v. *NLRB*, 301 U.S. 103, 132 (1937) (Labor Act "forbids discharge for what has been found to be the real motive" of the employer). *See generally* Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv.L.Rev. 1, 21 (1947).

[8] Carl L. Norton, Inc., 62 NLRB 828, 831 n.12 (1945); *see also* John W. Campbell, Inc., 58 NLRB 1153, 1162-63 (1944); Lone Star Gas Co., 52 NLRB 1058, 1060 (1943); United Dredging Co., 30 NLRB 739, 766 (1941); Republic Creosoting Co., 19 NLRB 267, 294 (1940).

ment denied in relevant part, 153 F.2d 480 (7th Cir. 1946), the Board disregarded the conclusions of the fact-finder and reevaluated the evidence to determine that an employee was discharged for union related activities rather than for interrupting the production of vital war materials. In *Columbia Products Corp.*, 48 NLRB 1452 (1943), *enf'd.*, 141 F.2d 687 (2d Cir. 1944), a distinguished panel of the Second Circuit felt compelled to enforce a reinstatement order despite evidence of employee insubordination in circumstances in which the court felt that the Board's finding of an unfair labor practice "strained the credibility."

B. The Taft-Hartley Amendments

Board decisions of this nature motivated Congress to take corrective action. In 1947, Congress, citing its dissatisfaction with cases of the *Wyman-Gordon* and *Columbia Products* ilk,[9] enacted three amendments to the Wagner Act specifically directed toward the Board's undue reliance upon employee union activity to infer a nefarious motive from a discharge for business-related cause.

First, language was added to Section 10(c) to prohibit the Board from ordering reinstatement upon discharge for cause.[10] Reviewing the existing practices, Congress recognized that, "[i]n the past, the Board, admitting that an employee was guilty of gross misconduct, nevertheless frequently reinstated him, 'inferring' that, because he was a member or an official of a union, this, not his misconduct, was the reason for his discharge."[11] The new language was added to prohibit the Board from reinstating an employee unless the "evidence shows

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[9] See H.R.Rep. No. 245, 80th Cong., 1st Sess. 41-42 (1947).

[10] See note 2 *supra*.

[11] H.R.Rep. No. 245, 80th Cong., 1st Sess. 42 (1947).

that the individual was not suspended or discharged for cause."[12] Accordingly, as Congress viewed this portion of Taft-Hartley, the Board "may not 'infer' an improper motive when the evidence shows cause for discipline or discharge."[13]

Second, Congress retrenched from the Wagner Act standard that allowed the Board to predicate its findings on "all the testimony." Acknowledging that this open-ended criterion permitted the Board too much leeway to justify discriminatory discharges from selected portions of the record or to fashion prohibited practices from multiple inferences, Congress imposed a "preponderance of the evidence" standard to eliminate the potential for abuse.[14] This change was deemed necessary to assure that inference would not be substituted for evidence.

Third, Congress altered the standard for judicial review of Board decisions, as set forth in Section 10(e), by requiring the rulings to be supported by "substantial evidence" rather than, as previously permitted, "supported by the evidence." This was intended to provide the circuit courts with "a real power to review" so that Board decisions no longer could represent an amalgam of inferences unsupported by facts.[15]

The combination of these amendments represented a congressional attempt to restrain a Board that was operating beyond the scope of its legislative mandate. By removing the Board's remedial authority to reinstate an employee when the discharge was for cause, by raising the evidentiary standard, and by enhancing the opportunity for judicial review, the Taft-Hartley amendments condemned the Board's "in part" test and its practice of drawing inferences without evidentiary support. In so doing, "Congress expressed a mood...that courts must now

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[12] Ibid.

[13] *Id.* at 43.

[14] H.R. Conf.Rep. No. 510, 80th Cong., 1st Sess. 56 (1947).

[15] Ibid.

assume more responsibility for the reasonableness and fairness of Labor Board decisions...."[16]

C. The Aftermath of Taft-Hartley

Notwithstanding the will of Congress, the Board continued to apply the "in part" motivation test and authorized reinstatement when a discharge was motivated in part by the employee's union related activities even though a legitimate business reason for termination also existed. Blithely ignoring the concerns of Congress, the Board articulated the rule as follows:

> Under Board precedent if part of the reason for terminating an employee is unlawful, the discharge violates the Act. As the Board and the courts have so often indicated, the issue is not whether there existed grounds for discharge apart from union or protected concerted activities. That the employer has ample reason for discharging an employee is of no moment. An employer may discharge an employee for any reason, good or bad, so long as it is not for union or protected concerted activity. Even if the discharge is based on other reasons as well, if the discharge is partly in reprisal for protected concerted activity, it is unlawful.[17]

This intractability on the Board's part caused considerable consternation among the reviewing courts. A variety of tests were spawned which generated confusion both within and among the circuits. The terminology employed by the courts to frame the tests contributed to the chaos.

Reduced to their rudiments, essentially three different tests were developed by the courts to ascertain the degree of anti-union animus necessary to warrant reinstatement:

The "in part" test, fully supporting the Board's historic practice, authorized reinstatement when a discharge was motivated at least in part by union-oriented activity. It was the

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[16] *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 487-90 (1951).

[17] Youngstown Osteopathic Hospital Ass'n., 224 NLRB 574, 575 (1976).

exclusive test employed by the Seventh[18] and Tenth[19] Circuits and had been adopted by panels of other circuits.[20]

At the other extreme was the "dominant motive" or "real motive" test which required the General Counsel to prove that the employee's protected activity furnished the dominant reason for his discharge. This doctrine had its origin in the First Circuit[21] and found considerable support among panels of other circuits.[22]

Between these poles was a middle ground that was expressed as a "but for" test, a "motivating factor" test, a "justifiable cause" test, a "moving cause" test and under various other labels. Essentially, discharge was prohibited under this ruberic if some evidence was adduced to show that

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[18] *See, e.g., Chicago Magnesium Castings Co.* v. *NLRB*, 612 F.2d 1028, 1034 (7th Cir. 1980); *Satra Belarus* v. *NLRB*, 568 F.2d 545, 548 (7th Cir. 1978); *Borek Motor Sales, Inc.* v. *NLRB*, 425 F.2d 677, 680 (7th Cir. 1970).

[19] *See, e.g., MSP Industries* v. *NLRB*, 568 F.2d 166, 173-74 (10th Cir. 1977); *NLRB* v. *Montgomery Ward & Co., Inc.*, 554 F.2d 996, 1002 (10th Cir. 1977).

[20] *See, e.g., NLRB* v. *Gladding Keystone Corp.*, 435 F.2d 129, 131 (2d Cir. 1970); *NLRB* v. *Printers Publishing Co.*, 625 F.2d 746, 749 (6th Cir. 1980); *Retail Store Employees* v. *NLRB*, 570 F.2d 586, 590 (6th Cir. 1978); *Penasquitos Village, Inc.* v. *NLRB*, 565 F.2d 1074, 1082-83 (9th Cir. 1977); *Allen* v. *NLRB*, 561 F.2d 976, 982 (D.C. Cir. 1977).

[21] *See, e.g., NLRB* v. *Wilson Freight*, 604 F.2d 712 (1st Cir. 1979); *Colletti's Furniture, Inc.* v. *NLRB*, 550 F.2d 1292 (1st Cir. 1977); *NLRB* v. *Lowell Sun Publishing Co.*, 320 F. 2d 835 (1st Cir. 1963).

[22] *See, e.g., Edgewood Nursing Center, Inc.* v. *NLRB*, 581 F.2d 363, 368 ;(3d Cir. 1978) (real motive); *Charge Card Assn.* v. *NLRB*, 653 F.2d 272, 275 (6th Cir. 1981); *NLRB* v. *Consolidated Freightways Corp.*, 651 F.2d 436, 437 (6th Cir. 1981); *Propak Corp.* v. *NLRB*, 578 F.2d 169, 170 (6th Cir. 1978)(actual impelling motive); *NLRB* v. *Nevis Industries*, 647 F.2d 905, 909 (9th Cir. 1981); *Western Exterminator Co.* v. *NLRB*, 565 F.2d 1114, 1118 (9th Cir. 1977).

the employer was motivated by protected activity even if the proof was not strong enough to show that anti-union animus was the dominating factor for the termination.[23]

D. The *Wright Line* Test

The extraordinary confusion over the appropriate standard to be employed in mixed motive discharge cases and the repeated judicial refusals to enforce Board orders ultimately became too much for the Board to bear. In *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the Board attempted to accomodate the conflicting lines of authority by focusing on two decisions of this Court which, in the Board's view, rejected both the "in part" and "dominant motive" tests and suggested a "motivating factor" standard.[24] Upon this basis, the Board announced a new causation test for dual motive discharge cases:

> First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same

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[23] *See, e.g., Waterbury Community Antenna, Inc.* v. *NLRB*, 587 F.2d 90, 98 (2d Cir. 1978)(but for); *Stein Seal Co.* v. *NLRB*, 605 F.2d 703 (3d Cir. 1979)(justifiable cause); *Neptune Water Meter Co.* v. *NLRB*, 551 F.2d 568 (4th Cir. 1977)(a factor); *NLRB* v. *Robin America Corp.*, 654 F.2d 1022 (5th Cir. 1981) (motivating factor); *NLRB* v. *Collier*, 553 F.2d 425, 428 (5th Cir. 1977)(motivating factor); *Frosty Morn Meats, Inc.* v. *NLRB*, 396 F.2d 617, 621 (5th Cir. 1961)(moving cause); *Keokuk Gas Service Co.* v. *NLRB*, 580 F.2d 328, 335 (8th Cir. 1978)(but for); *Lippincott Industries* v. *NLRB*, 661 F.2d 112 (9th Cir. 1981)(moving cause or but for cause); *Amalgamated Clothing Workers* v. *NLRB*, 564 F.2d 434, 440 (D.C. Cir. 1977) (but for).

[24] *See Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

> action would have taken place even in the absence of the protected conduct.

251 NLRB at 1089.

Satisfaction of the substantive "motivating factor" standard was deemed sufficient to both shift the burden of proof and sustain the ultimate burden to justify reinstatement if the employer could not demonstrate that a legitimate business reason compelled the discharge. The Board acknowledged that, although it was abdicating the "in part" standard, "our abandonment of this familiar phraseology should not be viewed as a repudiation of the well-established principles and concepts which we have applied in the past." Member Jenkins concurred in the result, but suggested that the "in part" test remained the only suitable criterion for cases in which the employer's purposes in effecting the discharge "are so interlocked that it is not possible to point to one of them as 'the' cause".

To the extent that it shifts the burden of production to the employer when the evidence shows that the protected activity was "a motivating factor" in the discharge, *Wright Line* is an accurate statement of law. However, by shifting the burden of *proof* to the employer to demonstrate that the same action would have taken place in the absence of the protected conduct, *Wright Line* requires the employer to prove that a legitimate business reason was the dominant motive for the discharge. Thus, despite the Board's lip service to a repudiation of the "in part" doctrine, the General Counsel can carry his burden, both before and after *Wright Line*, by proving that a prohibited reason was part of the employer's motive for the discharge.

In the wake of its decision, it became clear that the Board, like the proverbial open-air market watch salesman, intended *Wright Line* to repackage the discredited "in part" test in a shinny new case while retaining its inferior mechanical parts. Thus, Chairman Fanning stated that *Wright Line* was the

"minimal deviation we could make" and "shouldn't be interpreted as a change in Board Policy."[25] Member Truesdale stated that "The case does not change the Board's traditional allocation of the burden of proof, nor is it likely to alter the standards by which the Board determines whether a litigant has carried its burden of proof."[26] The Board's General Counsel informed his staff throughout the country that *Wright Line* was no more than a clarification of the Board's traditional test rather than a substantive change in the animus standard required to support reinstatement in dual motive discharge cases.[27]

As thus seen, *Wright Line* was intended to represent nothing more than a restatement of the "in part" test; and, in practice, this intent has been preserved. "When post-*Wright Line* cases issued by the board are examined, it is obvious that although utilizing somewhat different terminology, the board continues to employ the in-part analysis."[28]

E. The Judicial Response To Wright Line

For the most part, the courts have viewed *Wright Line* as an acceptable method for reducing the confusion that previously existed in dual motive discharge cases. While most opinions have merely recited and applied the *Wright Line* test

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[25] BNA Daily Labor Reports (1-29-81) (speech before the Industrial Union Dept. AFL-CIO Organizing Conference).

[26] 4 Lab.L.Rep. (CCH) ¶9239 (10-3-80) (remarks before the Labor Law and Labor-Management Relations Conference).

[27] General Counsel Memorandum 80-58 (11-24-80)("if the employer fails to establish the affirmative defense, the General Counsel will prevail, regardless of the quantum of unlawful motivation involved").

[28] Lasky & Leathers, *Applying The Wright Line Test: Mixed Results in the Circuits*, Nat'l. L.J., 3-22-82, at 32, col 1; *see also* Coleman, *Wright Line: A Variation of the Old Shell Game—Now You See It, Now You Don't*, 28 Fed. B. News & J. 208, 209 (1981).

without extended discussion,[29] the clear conflict that brought the case to this Court evolved from disparate views over the propriety of shifting the burden of proof to the employer. The Eighth and Ninth Circuits have accepted the *Wright Line* test in total;[30] the First, Third and Seventh Circuits have held that the NLRA prohibits the Board from shifting the burden.[31] Different panels of the Fifth Circuit appear to be divided on the question;[32] and the Fourth, Sixth and Tenth Circuits have acknowledged but declined to decide the issue.[33]

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[29] *See, e.g., Borel Restaurant Corp.* v. *NLRB*, 676 F.2d 190 (6th Cir. 1982); *Doug Hartley Inc.* v. *NLRB*, 669 F.2d 579 (9th Cir. 1982); *NLRB* v. *Charles H. McCauley Associates Inc.*, 657 F.2d 685, 1688 (5th Cir. 1981); *NLRB* v. *Robin American Corp.* 654 F.2d 1022, 1025 (5th Cir. 1981); *Charge Card Ass'n.* v. *NLRB*, 653 F.2d 272, 275 (6th Cir. 1981); *NLRB* v. *Fry Roofing Co.*, 651 F.2d 422, 446 (6th Cir. 1981); *NLRB* v. *Allen's IGA Foodliner*, 651 F.2d 438, 440 (6th Cir. 1981); *NLRB* v. *Consolidated Freight Ways*, 651 F.2d 436 (6th Cir. 1981); *NLRB* v. *Nevis Industries*, 647 F.2d 905 (9th Cir. 1981).

[30] *See Zurn Industries, Inc.* v. *NLRB*, 680 F.2d 683 (9th Cir. 1982); *NLRB* v. *Fixtures Mfg. Corp.*, 669 F.2d 547, 550 (8th Cir. 1982).

[31] *See NLRB* v. *Webb Ford*, 689 F.2d 733, 739 (7th Cir. 1982); *Behring Int'l. Inc.* v. *NLRB*, 675 F.2d 83 (3d Cir. 1982); *NLRB* v. *Wright Line*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

Prior Seventh Circuit decisions seemed to indicate acceptance of the *Wright Line* test. *See, e.g., NLRB* v. *Town & Country LP Gas*, 687 F.2d 187 (7th Cir. 1982); *NLRB* v. *Eldorado Mfg. Co.*, 660 F.2d 1207 (7th Cir. 1981); *Peavey Co.* v. *NLRB*, 648 F.2d 460 (7th Cir. 1981); *Sullair P.T.O. Inc.* v. *NLRB*, 641 F.2d 500 (7th Cir. 1981). However, in *Webb Ford*, the court indicated that its earlier rulings did not reach the procedural qestion. 689 F.2d at 739 n.5.

[32] *Compare Red Ball Motor Freight, Inc.* v. *NLRB*, 660 F.2d 626, 627-28 (5th Cir. 1981), *cert. denied*, ____ U.S. ____ (1982) (accepting burden shift without extended analysis) *with* TRW, Inc. v. NLRB, 654 F.2d 307 (5th Cir. 1981) (implictly rejecting burden shift)

[33] *See NLRB* v. *Comgeneral Corp.*, 684 F.2d 367, 369-70 (6th Cir. 1982); *NLRB* v. *Carbonex Coal Co.*, 679 F.2d 200, 203-04 (10th

(footnote continued on following page)

The courts that disapproved of the burden shifting requirement were compelled to reach the substantive degree of anti-union animus necessary to satisfy the General Counsel's ultimate burden. In *Wright Line*, the First Circuit abandoned its prior "dominant motive" test and accepted the Board's "but for" standard, finding the causitive link between anti-union animus and the discharge "most accurately determined by asking whether the discharge would have occurred 'but for' the protected activity." 662 F.2d at 903. In *Behring International*, the Third Circuit found that the "but for" test "satisfies this court's requirement that the Board seek the 'real motive' or 'real cause' for an employee's discharge." 675 F.2d at 87. In *Webb Ford*, the Seventh Circuit altered the formulation somewhat, stating that the General Counsel "has the obligation to prove by a preponderance of the evidence that those proffered reasons were not the Company's true reasons for the discharge." 689 F.2d at 739.[34]

As the issue comes before this Court, there is a clear conflict on the burden of proof question. We will demonstrate that the authorities which compel the General Counsel to satisfy the burden of proof were correctly decided. Once that issue is resolved, however, it is necessary to define the substantive scope of the burden. On that score, we will show that it is incumbent

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(footnote continued from preceding page)

Cir. 1982); *NLRB* v. *Burns Motor Freight, Inc.*, 635 F.2d 312, 315 (4th Cir. 1980). Prior Fourth Circuit law clearly placed the burden on the General Counsel to show "an affirmative and persuasive reason why the employer rejected the good reason and chose the bad one." *Proctor & Gamble Mfg. Co.* v. *NLRB*, 658 F.2d 968, 980 (4th Cir. 1981).

[34] The Sixth Circuit has recognized that the substantive degree of anti-union animus under *Wright Line* is less than the dominant motive test, but did not have occasion, on the facts before it, to determine the appropriate burden. *Charge Card Ass'n.* v. *NLRB*, 653 F.2d 272, 275 (6th Cir. 1981).

on the General Counsel to prove that protected activities furnished the employer's dominant motive in effecting the discharge.

II

BECAUSE THE DEGREE OF ANTI-UNION ANIMUS NECESSARY TO SUSTAIN REINSTATEMENT—THE SUBSTANTIVE BURDEN — IS INEXTRICABLY INTERTWINED WITH THE IDENTIFICATION OF THE PARTY WHO BEARS THAT BURDEN — THE PROCEDURAL BURDEN — THIS COURT'S TITLE VII DECISIONS FURNISH THE APPROPRIATE STANDARDS FOR RESOLVING SECTION 8(a)(3) DUAL MOTIVE DISCHARGES.

A. The Impact Of *Mt. Healthy*

The analytical framework for the Board's *Wright Line* test was supplied by this Court's decision in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). There, a school teacher was notified that his contract would not be renewed shortly after he called a local radio station to criticize the school's new dress code policy. The lower courts sustained his constitutional claim on the theory that the discharge was motivated "at least in part" by constitutionally protected activity.

In a unanimous opinion, this Court rejected the "in part" rationale and announced a test of causation designed to identify the principle cause of the discharge:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those

> responsible for the decision to rehire, and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position that if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

429 U.S. at 285-86.

By analogy to the line of criminal cases dealing with the concept commonly recognized as the "fruit of the poisonous tree" doctrine.[35] the Court fashioned "a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused." 429 U.S. at 286. Under this mode of analysis, Justice Rehnquist's opinion stated the substantive scope of the burden and the manner in which it must be discharged:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or, to put it in other words, that it was a "*motivating factor*" in the Board's decision not to rehire him. Respondent having carried that burden,

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[35] *See, e.g., Wong Sun* v. *United States*, 371 U.S. 471 (1963); *Nardone* v. *United States*, 308 U.S. 338, 341 (1939). *See also Parker* v. *North Carolina*, 397 U.S. 790 (1970); *Lyons* v. *Oklahoma*, 322 U.S. 596 (1944).

> however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

429 U.S. at 287 (emphasis added)(footnote omitted).

The "motivating factor" phrase in the above quotation contained a footnote reference to *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), decided the same day as *Mt. Healthy*. In *Arlington Heights*, a developer interested in building integrated housing in a Chicago suburb challenged the Village's refusal to rezone the property on constitutional and Fair Housing Act grounds. The Court rejected an "effects" test and indicated that the question turned on intent to discriminate. Outlining the respective burdens, the Court held that the plaintiff was obliged to prove that invidious discrimination was "a motivating factor" in the defendant's decision and rejected a higher "dominant motive" standard in this context:

> Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

429 U.S. at 265-66 (footnotes omitted).[38]

Mt. Healthy did not rely upon the rejection of the dominant motive test in *Arlington Heights* when referencing the "motiva-

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[38] The Court's footnote references made it clear that the "dominant motive" test was rejected in the unique context of legislative purpose. *See McGinnis v. Royster*, 410 U.S. 263, 276-77 (1973); *Palmer v. Thompson*, 403 U.S. 217 (1971). 429 U.S. at 266 nn. 11-12.

ting factor" language. Rather, the Court cited another portion of the opinion which concluded that the plaintiffs "simply failed to carry the burden of proving that discriminatory purpose was a motivating factor in the Village's decision. This conclusion ends the constitutional inquiry." 429 U.S. at 270-71.

These considerations leave the *Mt. Healthy* formulation open to a number of readings. First, *Mt. Healthy* can be viewed, in accordance with the Board's *Wright Line* test, to shift the burden of proof, absent statutory constraints not present in the constitutional balancing precepts involved in *Mt. Healthy*,[37] upon a showing that protected activity was a "motivating factor" in the discharge. Second, it can be read to demand a showing that the protected activity furnished the dominant motive for the discharge before the defendant is required to come forward with evidence designed to dissipate causation.[38] Finally, and most plausibly, *Mt. Healthy*, in its application to the NLRA context, can be viewed as a broad brush constitutional formulation that did not foreclose the possibility that an aggreived plaintiff may have both an intermediate and ultimate burden.

The Board and Amicus AFL-CIO attempt to accomodate *Mt. Healthy* to the *Wright Line* test; but, in so doing, they are compelled to mix the substantive component of that test with the procedural burden of proof question. Thus, the Board contends that "the General Counsel must prove by a preponderance of the evidence that the employee's protected activity was *in fact* a motivating factor in the employer's disciplinary decision." (Bd. Br. 30). At this point, the Board assumes that the General Counsel's ultimate burden is satisfied and argues that the employer must either discredit the General

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[37] *See* Argument IIB *infra*.

[38] *See* Wolly, *What Hath Mt. Healthy Wrought* 41 Ohio State L.J. 385 (1980); DuRoss, *Toward Rationality in Discriminatory Discharge Cases: The Impact of Mt. Healthy Board of Education* v. *Doyle Upon the NLRA*, 66 Georgetown L.J. 1109 (1978).

Counsel's case by showing that the protected activity was not "a motivating factor" at all or carry the burden of an affirmative defense. (Bd. Br. 33).

Amicus AFL-CIO approaches the issue in the same manner, contending that the Board's ultimate burden is carried upon a showing that the employer relied upon any impermissable reason in terminating the employee. Following the introduction of proof of this nature, the issues become strictly remedial and the burden is on the employer because "the wrongdoer shall bear the risk of uncertainty which his own wrong has created".[39] (AFL-CIO Br. 7-8).

Thus, before the employer is ever called upon to produce evidence, both the Board and amicus assume that liability has been resolved against him and the stage of the proceeding is tantamount to the remedial stage of a Title VII case. Seen another way, these arguments would require a criminal defendant to produce evidence in mitigation of sentence without ever affording him the opportunity of a defense.

The problem with the Board's analysis is its assumption that there can be no such thing as a legitimate dual motive discharge. Once the General Counsel proves that a protected activity was any part of the motivation for the discharge, his case is over. The employer, at this point, is labelled a "wrongdoer" and must bear the burden of "disentang[ing] the consequences for which it was chargable from those for which it was immune."[40]

Under this formulation, the General Counsel need only demonstrate a "bad" motive and may ignore the possibility that the employer genuinely had a *dual* motive for the discharge. The employer then must offer an affirmative defense—with its

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[39] *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 265 (1946); *see Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U.S. 555, 565 (1931).

[40] *NLRB* v. *Remington Rand, Inc.*, 94 F.2d 862 (2d Cir.), *cert denied*, 304 U.S. 576 (1938). See AFL-CIO Br. 15-16.

requisite burdens—to show that the discharge would have occurred in the absence of the bad motive. For a variety of reasons, we do not believe that *Mt. Healthy* authorizes this procedure.

First, the Board loosely interprets *Mt. Healthy's* "motivating factor" requirement to mean "proof that the [discharge] decision was based, at least in part, on an unlawful reason." (Bd. Br. 33). This not only represents a resurrection of the Board's discredited "in part" test, but also flies in the face of the essential underpinning of the *Mt. Healthy* decision. As the Court subsequently has indicated, *Mt. Healthy* requires a discharged employee to show "that his constitutional protected conduct played a '*substantial*' role in the employer's decision"[41] before the burden will shift. Thus, the Court's pronouncements impose a greater burden than *Wright Line* acknowledges.

Second, the "but for" test that has evolved from *Mt. Healthy* represents a misreading of the opinion. Under *Mt. Healthy*, once the protected activity is proven to have substantially motivated the discharge, the employer must prove "that it would have reached the same decision...even in the absence of the protected conduct." 429 U.S. at 287. Substituting a mechanical equasion for hard analysis, the courts have viewed *Wright Line's* interpretation of *Mt. Healthy* to create a "but for" test under which reinstatement is warranted if the discharge would not have occurred "but for" the protected activity. The Board believes that the employer must prove, by way of affirmative defense, that the discharge was ordered for reasons independent of the union activity; the courts that have rejected

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[41] *Givhan* v. *Western Line Consolidated School Dist.*, 439 U.S. 410, 416 (1979) (emphasis added); *see also Teamsters* v. *United States*, 431 U.S. 324, 368 (1977) (*Mt. Healthy* cited for the proposition that proof of discriminatory practice is a "not always easy burden....").

the shifting burden believe that the General Counsel must prove that the employee would not have been fired "but for" the union activity".[42]

This simplistic "but for" formula is contrary to the import of *Mt. Healthy*. In establishing the constitutional test of causation, the Court analogized the discharge situation to its "fruit of the poisonous tree" doctrine governing the admissibility of evidence in criminal cases. One of the decisions relied upon, *Wong Sun v. United States*, 371 U.S. 471 (1963), specifically rejected a "but for" analysis as a framework for that constitutional test: "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light *but for* the illegal actions of the police." 371 U.S. at 487-88 (emphasis added). In *Brown v. Illinois*, 422 U.S. 590, 603 (1975), the Court refused to hold a confession inadmissible simply because it would not have been secured "but for" an illegal arrest. Justice Powell's concurring opinion, joined by the author of *Mt. Healthy*, recognized "[t]he Court's rejection in *Wong Sun* of a 'but for' test, reaffirmed today...." 422 U.S. at 608. These cases focus not on neat formulas, but on whether the hard facts show that the evidence was tainted by the illegal conduct.

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[42] *See NLRB* v. *Wright Line*, 662 F.2d 899, 906 n.12 (1st Cir. 1982):

> Our disagreement with the Board may reduce to this: the Board apparently feels that the Act is violated by a showing of anti-union sentiment in connection with a discharge. It would then impose an affirmative defense upon the employer to negate the violation. In our view, by contrast, the Act is violated only when an employer with anti-union animus discharges an employee he would not have fired "but for" the employee's union activity. We think that even employers who do not particularly like unions nevertheless comply with the law so long as they treat all their employees—union and nonunion—alike.

See also Behring Int'l., Inc. v. *NLRB*, 675 F.2d 83, 87 (3d Cir. 1982). *But cf. NLRB* v. *Webb Ford*, 689 F.2d 733, 739 (7th Cir. 1982) (General Counsel must prove "that those proffered reasons were not the Company's true reasons for the discharge.").

When viewed in this context, *Mt. Healthy* does not furnish the easy generalizations and tallismatic approach ascribed to it by the *Wright Line* test. Rather, it established a broad formulation for ascertaining whether an individual has been punished for engaging in constitutionally protected activity. It required an aggrieved party to show that his discharge was substantially tainted by reliance upon protected activity and proposed an evidentiary standard for determining whether the discharge was in fact tainted by the exploitation of prohibited conduct by the employer. In outlining these concepts in sweeping fashion to meet the needs of a general constitutional claim, *Mt. Healthy* did not reject the possible distinction between an intermediate burden and an ultimate burden or the prospect that proof of a dominant motive was meaningful to gauge the actions of individuals as opposed to legislative or administrative bodies. This case provides a vehicle for the Court to fill in the interstices of *Mt. Healthy'* s broad brush formulation in the context of the NLRA.

The Courts that have rejected *Wright Line's* burden-shifting approach read *Mt. Healthy* to require the employer to bear the burden of proof on the ultimate issue, but find it inapposite for different reasons. The Third Circuit concluded that, unlike the pure constitutional question involved in *Mt. Healthy,* " the Board is bound by statutory limitations which foreclose the issue."[43] The First Circuit found *Mt. Healthy* factually distinguishable on the ground that the employer there *conceded* that the discharge took place in part for constitutionally protected activity. Thus, the "but for" test was not used, as it is in the typical labor case, to determine whether a violation occurred; but was employed to shift the burden in the context of "a true affirmative defense which went to the appropriateness of the remedy being applied rather than to the existence of a violation in the first instance."[44]

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[43] *Behrig Int'l., Inc.* v. *NLRB,* 675 F.2d 83, 88 (3d Cir. 1982)

[44] *NLRB* v. *Wright Line,* 662 F.2d 899, 906 (1st Cir. 1981). The court also held that the Board was precluded by statute from shifting the burden; but did not rest its distinction of *Mt. Healthy* on that ground, 662 F.2d at 904 & n.8.

We now will demonstrate that the Third Circuit's conclusion is compelled by the NLRA and its legislative history which require the General Counsel to shoulder the burden of proof throughout the proceeding. Upon that backdrop, we will show that the more realistic approach is to harmonize *Mt. Healthy* with the Court's Title VII decisions in order to develop a uniform standard for resolving dual motive discharge cases in a manner designed to balance the conflicting policies of the Act.

B. Burden of Proof Under the NLRA

It is undisputed that the General Counsel, in bringing the resources and prestige of the federal government to bear upon a private entity, carries the burden of proof in a Section 8(a)(3) case. The burden is imposed by the Board's regulations,[45] the Administrative Procedure Act,[46] and the decisional law.[47] The question is whether the NLRA permits that burden to shift to an employer so that he is compelled to disprove an *essential element* of the General Counsel's case.

In *NLRB v. Great Dane Trailors, Inc.*, 388 U.S. 26 (1967), this Court considered a situation in which an employer, as a matter of company policy, discriminated between strikers and non-strikers with regard to vacation pay. Relying on a series of prior decisions involving employer policies that, on their faces,

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[45] 29 C.F.R. § 101.10(b) provides that "[t]he Board's attorney has the burden of proof of violation of Section 8 of the National Labor Relations Act."

[46] 5 U.S.C. § 556(d) states that, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

[47] *See, e.g., NLRB* v. *Whitfield Pickle Co.*, 374 F.2d 576, 580 (5th Cir. 1967)(General Counsel's burden was to show that company discriminated because of union activity); Campbell & McLean, Inc., 118 NLRB 967, 971 (1957)(burden on General Counsel to establish discriminatory motivation, not on respondent to disprove it); Glen Raven Silk Mills, Inc., 101 NLRB 238, 240 (1952) *enf'd in part*, 203 F.2d 946 (4th Cir. 1953) (violation of NLRA must be proved by General Counsel by preponderance of the evidence).

displayed anti-union animus,[48] the Court constructed a two-tier test for examining motive under Section 8(a)(3). When the employer's policy is "inherently destructive" of the employee's statutory right to organize, the policy itself is demonstrative of motive and even the employer's business justification may be disregarded. When the impact on union activity is "comparatively slight," the Board must require proof of anti-union motive. In either situation:

> . Once it has been proved that the employer engaged in discriminatory conduct which would have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

388 U.S. at 34. (emphasis in text).

In allocating the burden, the *Great Dane* opinion focused on systemic policies of an employer which have no corresponding application to the discharge of a single employee.[49] "Where an overall policy concededly does discriminate against protected activity, the Board must balance the employer's justification against the employee's interest, and it may fairly require the employer to demonstrate the genuineness and strength of its asserted business reason. But here the issue is whether the discharge was in fact discriminatory—whether it was caused by protected activity or whether some other factor was opera-

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[48] *See American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 311-12 (1965) (lockouts during strike to compel union settlement); *NLRB* v. *Brown*, 380 U.S. 278, 290 (1965)(lockout during strike); *NLRB* v. *Erie Resistor*, 373 U.S. 321 (1963) (employing replacements during strike); *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938)(permanent replacements for strikers).

[49] *See* DuRoss, *supra* note 38, at 1127 (footnotes omitted):

> Although discharge of individual employees to discourage pro-union activity might be deemed so "inherently destructive" as to go "to the heart of the Act," the better view is that *Great Dane* has no application to the burden of proof in most mixed-motive discharge cases. Indeed, such a shift would be inconsistent with the Court's recent decisions involving employee discharge in first amendment and title VII cases.

tive."[50] Moreover, "*Great Dane* was not concerned with the difference between the burden of production and the burden of persuasion, and terms applicable to both are used interchangably throughout the opinion."[51]

When the *Great Dane* analysis is removed from the framework, the question is reduced to whether the Act authorizes the Board to allocate the burden of proof as it did in *Wright Line*. The Board contends that its allocation of the burden in *Wright Line* was no more than a restatement of its historic practices which have received judicial approval and congressional sanction. (Bd. Br. 14-22).

Contrary to the Board's assertion,[52] in the period antedating Taft-Hartley, the courts were not uniform in their assessment of the burden of proof question. While some opinions were in accord with the Board's claim that the Act placed the burden of proving a legitimate reason for the discharge on the employer,[53] others viewed the burden more in terms of an obligation to come forward with evidence[54] and a third category held that the burden of proof remained with the General Counsel. In the later category is *Interlake Iron Corp. v. NLRB*,

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[50] *NLRB* v. *Wright Line*, 662 F.2d 899, 904 n.8 (1st Cir. 1981) ("*Great Dane* has no application".); *see* Janofsky, *New Concepts In Interference And Discrimination Under The NLRA*, 70 Colum.L.Rev. 81, 96 (1970).

[51] *Behring Int'l., Inc.* v. *NLRB*, 675 F.2d 83, 89 (3d Cir. 1982). Justice Harlan's dissenting opinion in *Great Dane* indicated that it was impossible for him to determine whether the Court was imposing a burden of proof or a burden of production in the narrow class of cases under consideration. 388 U.S. at 38-39.

[52] As the Third Circuit has indicated: "Over the years we have observed that our decisions restricting the Board are rarely cited by it, no matter how perinent, a seeming symbolic bookburning difficult to ascribe to oversight." *NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d 666, 670 n.7 (3d Cir. 1979).

[53] *See, e.g., NLRB* v. *Barrett Co.*, 135 F.2d 959, 962 (7th Cir. 1943); *NLRB* v. *Entwistle Mfg. Co.*, 120 F.2d 532, 546 (4th Cir. 1941).

[54] *See, e.g., Montgomery Ward & Co.* v. *NLRB*, 107 F.2d 555, 560 (7th Cir. 1939).

131 F.2d 129 (7th Cir. 1942), where Justice Minton, then a circuit judge, specifically held that "[t]he Board cannot shift the burden of proof or impose what it chooses to call the duty of the company to go forward with the evidence [as to cause] *** The company does not have to prove non-discrimination. The Board must prove discrimination because thereof. This burden of the Board to prove discrimination and to prove that discrimination was employed in the hiring or firing of a man because of his union activities does not shift from the Board." 131 F.2d at 133-34.[55]

In this state of judicial dissarray, Congress considered the 1947 Taft-Hartley Amendments to the Wagner Act. As previously indicated,[56] Congress was concerned with the ease with which the Board was sustituting inference for evidence in finding otherwise legtimate discharges improper because of the employee's union activities. Three changes were made to meet this problem: the Board's remedial authority to reinstate an employee discharged for cause, to the extent it was presumed to exist, was eliminated; the quantum of evidence upon which the Board could base an order was elevated from "all the testimony" to "a preponderance of the evidence"; and the standard for judicial review was altered to require deference only to those Board orders based on "substantial evidence" rather than, as the Wagner Act allowed, "all the evidence".

The Board focuses on certain legislative events that occurred during the evolution of these amendments to claim that Congress specifically authorized the burden-shifting rule of the *Wright Line* test. The scenario that the Board attempts to use to its own advantage developed as follows:

In the House draft of the bill, the following language appeared:

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[55] *See also NLRB* v. *Union Mfg. Co.*, 124 F.2d 332, 333 (5th Cir. 1941); *Martel Mills Corp.* v. *NLRB*, 114 F.2d 624, 631 (4th Cir. 1940).

[56] *See* Argument IB *supra*.

> If upon *the weight of the evidence* the Board shall not be of the opinion in the case of any person named in the complaint that such person has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint as to such person. * * * No order of the Board shall require the reinstatement of any individual as an employee, or the payment to him of any back pay, unless *the weight of the evidence* shows that such individual was not suspended or discharged for cause.[57]

Dissenting members of the House Committee, without intimating that the proposed language concerned a shifting burden of proof, objected to the amendments.[58] A compromise

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[57] I Legislative History of the Labor Management Relations Act, 1947 69 (NLRB 1948)(emphasis added)

[58] *Id.* at 382-84 (H.R. Rep. No. 245, 80th Cong., 1st Sess. 42, 91-93 (1947)):

> 3. *Weight of Evidence*
>
> Section 10(c) of the bill would amend section 10(c) of the National Labor Relations Act to provide that the National Labor Relations Board's findings must be based on the "weight of the evidence."
>
> If this proposed change means something more than a preponderance of evidence, it introduces an undesirable change in administrative procedure. The rule has uniformly been that an agency may rest its findings upon a preponderance of evidence. No proper reason exists to make an exception in the case of the National Labor Relations Board. The only effect of the proposal is to hinder the prevention of unfair labor practices by rendering the proof of such practices more difficult.
>
> • • •
>
> 6. *Discriminatory Discharges*
>
> The bill would amend section 10(c) of the National Labor Relations Act to provide that the Board may not order the reinstatement of any individual "unless the weight of the evidence shows that such individual was not suspended or discharged for cause."

(footnote continued on following page)

ultimately was reached in Conference Committee and the language was changed into that which is the current text of the Act:

> If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.[59]

The House Conference Report, probably the most definitive source of legislative intent,[60] did not contain the slightest indication that the Conference Committee's resolution of the dispute concerned a shifting burden of proof question:

(footnote continued from preceding page)

> This provision, like so many others in this bill, would shackle the National Labor Relations Board in the prevention of unfair labor practices. The Board, by its terms, would be required to find on "the weight of the evidence" not only that the discharge was in violation of the act but also that the discharge was not for cause. The effect of this provision is to permit an employer to escape liability for having discharged an employee for his union activities merely if grounds existed which would justify the employee's discharge. Since an employer can always find some reason for justifying the discharge, this proposal would render a nullity the protection afforded workers by the National Labor Relations Act against discrimination because of union activities. There is no reason why, if the proof shows that an employee has actually been discharged because of his legitimate union activities the employer should be allowed to escape the consequences of his unlawful conduct by pleading circumstances or conduct which he was perfectly willing to tolerate until the employee became active in a union.

[59] *Id.* at 13. The provision is now codified as 29 U.S.C. §160 (c).

[60] *See, e.g., Leedom* v. *Int'l. Union*, 352 U.S. 145, 149-50 (1956).

> The House bill also included, in section 10(c) of the amended act, a provision forbidding the Board to order reinstatement or back pay for any employee who had been suspended or discharged, unless the weight of the evidence showed that the employee was not suspended or discharged for cause. The Senate amendment contained no corresponding provision. The conference agreement omits the "weight of evidence" language, since the Board, under the general provisions of section 10, must act on a preponderance of evidence, and simply provides that no order of the Board shall require reinstatement or back pay for any individual who was suspended or discharged for cause. Thus employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other cause...will not be entitled to reinstatement.[61]

When the amended bill came to the Senate floor, Senator Taft, the Senate sponsor, engaged in an extensive colloquy with Senator Pepper, an ardent pro-labor opponent of the Taft-Hartley Amendments. Raising the shifting burden of proof issue for the first time in its legislative evolution, Senator Pepper claimed that, as he read the final version of the bill, "[t]he provision shifts the burden of proof to make the worker show he was discharged for union activities, rather than to make the employer show that the worker was discharged for cause." Senator Taft, under the erroneous assumption that the courts were uniform in upholding the Board's allocation of the burden, responded by stating that, while the House may have intended to alter the burden in its initial draft, under the "provision of the conference report, the employer has to make the proof. That is the present rule and the present practice of the Board."[62]

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[61] I Legislative History, *supra*, note 57, at 559 (H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 55 (1947)).

[62] II Legislative History, *supra* note 57, at 1593-95 (93 Cong.Rec. 6518-19 (1947)). The entire exchange is also reproduced in *Zurn Industries, Inc.* v. *NLRB*, 680 F.2d 1683, 690-92 n.14 (9th Cir. 1982).

(footnote continued on following page)

Based upon these legislative activities, the Board contends that "Congress specifically approved the allocation of the burdens of proof reflected in the Board's standards...." (Bd.Br. 21-22). This argument totally ignores the fact that, in enacting Taft-Hartley, Congress was concerned with abuses committed by the Board and the facility with which it was utilizing inferences to order the reinstatement of employees discharged for legitimate business reasons.[63] The bill was passed to impose restrictions on the Board, not to truncate the General Counsel's obligation to prove his case.

Moreover, legislative intent is difficult to determine in the best of circumstances; here, as to the burden of proof question, it is virtually impossible. When an issue not referred to in the text of an act is raised for the first time in floor debate, and the sponsor responds by asserting that the bill is not intended to change existing law which, contrary to his expressed understanding, is in a state of disarray, the situation hardly evidences

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Senator Taft's position was echoed by Senator Ball in urging an override of President Truman's veto of Taft-Hartley:

> [There] is an explicit provision inserted in the bill in conference, saying that if the employer proves to the satisfaction of the Board that he discharged an employee for cause, he cannot be held guilty of an unfair-labor practice in discharging him. That is exactly the rule which the courts now require the National Labor Relations Board to follow. In order words, if the National Labor Relations Board finds that an employer discharged an employee for cause, they cannot find him guilty of an unfair-labor practice, and it is up to the Board to make the decision.

II Legislative History, *supra* note 57, at 1640 (93 Cong. Rec. 7529 (1947)). Obviously, the bill contained no "explicit provision" of the type contemplated by Senator Ball; and the Board's reliance on his remarks omits the erroneous premise upon which he relied. (Bd. Br. 20).

[63] "All history demonstrates that legislation intervenes only when a definite abuse has disclosed itself, through the excess of which public feeling has finally been aroused." B. Cardozo The Nature of the Judicial Process 144 (1921).

congressional approval of a particular interpretation of the statute.[64] For this reason, all of the courts that have considered the question have found "the legislative history as well as the statutory language inconclusive on the question of burden of proof."[65]

The circuits part company on whether the Board's shifting burden rule is a reasonably defensible interpretation of the Act[66] or a pure question of law that is inconsistent with the text of the Act.[67] Under this Court's decisions, a reasonably defensible construction of the statute by the Board is accorded deference even though the courts may have perferred a different approach.[68] However, the Board's interpretation must be rejected when it has no reasonable basis in law, "either because the proper legal standard was not applied or because the Board

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[64] "A loose statement even by a chairman of a committee, made impromptu in the heat of debate, less informing in cold type than when heard on the floor, will hardly be accorded the weight of an encyclical." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum.L.Rev. 527, 543 (1947).

[65] *NLRB* v. *Wright Line*, 662 F.2d 899, 904 n.8 (1st Cir. 1981); *see also Zurn Industries* v. *NLRB*, 680 F.2d 683, 693 (9th Cir. 1982); *Behring Int'l., Inc.* v. *NLRB*, 675 F.2d 83, 90 n. 6 (3d Cir. 1982). Judge Breyer, concurring below, did not find the intent of Congress inconclusive; he believes that the statutory language and congressional intent "indicate quite clearly that the Board, not the employer, must bear the overall burden of showing a violation of the Act." *NLRB* v. *Transportation Mgt. Corp.*, 674 F.2d 130, 133 (1st Cir. 1982).

[66] *See Zurn Industries* v. *NLRB*, 680 F.2d 683, 693 (9th Cir. 1982); *NLRB* v. *Fixtures Mfg. Corp.*, 669 F.2d 547, 550-51 n. 4 (8th Cir. 1982).

[67] *See Behring Int'l. Inc.* v. *NLRB*, 675 F.2d 83, 90 n.6 (3d Cir. 1982); *NLRB* v. *Transportation Mgt. Co.*, 674 F.2d 130, 133 (1st Cir. 1982) (Breyer, J., concurring); *NLRB* v. *Wright Line*, 662 F.2d 899, 904 n.8 (1st Cir. 1981).

[68] *See, e.g., Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 496-97 (1979); *NLRB* v. *Iron Workers*, 434 U.S. 335, 350 (1978).

applied the correct standard but failed to give the plain language of the standard its ordinary meaning."[69]

In this case, as in *Packard Motor Co. v. NLRB*, 330 U.S. 485, 492 (1947), there is "no ambiguity in this Act to be clarified by resort to legislative history, either of the Act itself or of subsequent legislative proposals which failed to become law." The Board is compelled to dismiss a complaint unless it is convinced of a violation by a preponderance of the evidence. 29 U.S.C. § 160(c). Federal administrative agencies are compelled by law to carry the burden of proof when they issue complaints against citizens. 5 U.S.C. § 556(d). The Board's own regulations acknowledge its burden of proof. 29 C.F.R. § 101.10. In these circumstances "there is little need to consult the legislative history because the statute is clear on the General Counsel's burden of proof and the Board's regulation is a significant expression of agreement on that point."[70]

Moreover, in the absence of a specific allocation of the burden by Congress, which the NLRA clearly does not contain, the *Federal Rules of Evidence* prohibit the shifting burden provision of *Wright Line*. Rule 301 provides:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

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[69] *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979); see *Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971); *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965).

[70] *Behring Intl., Inc.* v. *NLRB*, 675 F.2d 83, 90 n.6 (3d Cir. 1982); *see also NLRB* v. *Transportation Mgt. Corp.*, 674 F.2d 130, 133 (1st Cir. 1982) (Breyer, J., concurring) ("How, in the face of this language, is it possible not to hold that the overall burden of proving a violation remains with the Board?").

The General Counsel's prima facie case, operating in the manner of a presumption, may shift the burden of production to the employer; but, under the Rule, it cannot shift the burden of proof.

This is made manifest by the evolution of the Rule. As submitted by the Court, the presumptions governed by the Rule were given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact once the party invoking the presumption established the basic facts giving rise to it. Thus, the original rule was tantamount to the *Wright Line* shifting burden principle. However, the House Judiciary Committee, instead of imposing a burden of persuasion on the party against whom the presumption was directed, adopted a provision which shifted the burden of going forward with the evidence and further provided that, notwithstanding contradicting evidence, "a presumption is sufficient evidence of the fact presumed, to be considered by the trier of fact." The Senate Judiciary Committee believed that the House's middle ground position still gave too much weight to a presumption and amended the Rule into the form in which it was enacted. The Committee Report stated:

> The effect of the rule as adopted by the Committee is to make clear that while evidence of facts giving rise to a presumption shifts the burden of coming forward with evidence to rebut or meet the presumption, it does not shift the burden of persuasion on the existence of the presumed facts. The burden of persuasion remains on the party to whom it is allocated under the rules governing the allocation in the first instance.[71]

In fashioning Rule 301, Congress expressly repudiated the approach taken by the Board in *Wright Line*.

Because the NLRA does not authorize the Board to compel an employer to shoulder the burden of proof, the

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[71] D.Louisell & C.Muller, I Federal Evidence 515-17 (1977) (tracing the legislative history of Rule 301).

Wright Line shifting burden principle is beyond the authority of the Board.

C. The Appropriate Procedure: The Title VII Cases.

1. The *Burdine* Formulation.

As we previously have indicated, the scope of this case is not confined to a resolution of whether *Mt. Healthy* is distinguishable from NLRB practices on statutory grounds. Because the degree of anti-union animus necessary to sustain reinstatement is interrelated with the appropriate allocation of the burden of proof, the magnitude of the burden must be defined if the allocation of the burden is to be meaningful in practice.[72] Thus, the proper disposition of this case depends upon an accommodation of the principles on which *Mt. Healthy* is based and those governing the NLRA's application to single employee discharges. This will provide the Board with an appropriate standard for resolving the multitude of mixed motive discharge cases that it annually must confront and, at the same time, will provide employers and union employees throughout the nation with sufficient certainty to guide their respective courses of conduct.

The appropriate framework for the disposition of single employee mixed-motive discharge cases under the NLRA has been supplied by *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and the authorities upon which it is based. In *Burdine*, a Texas state employee claimed that her discharge from a federally funded job placement program was based on gender discrimination in violation of Title VII.[73] The

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[72] *See* Enright, *The Motivation Requirement In Single Employee Discharge Cases*, 11 Loyola U.L.J. 501, 516 (1980)("Resolving the current conflict over the standard to be applied in single employee mixed-motive discharge cases will require careful consideration of both the underlying policies served by the Act and the practical problems of allocating the burden of proof in a complaint case.")

[73] Title VII of the Civil Rights Act of 1964 is codified in 42 U.S.C. § 2000e *et seq.*

district court found that Burdine's supervisor provided a rational explanation for the discharge; but the Fifth Circuit reversed, holding that the defendant carries the burden of proving by a preponderance of the evidence that there was a legitimate, nondiscriminatory reason for the discharge.[74]

In a unanimous opinion, this Court reversed the Fifth Circuit's allocation of the burden and held that the ultimate factual question must be resolved through a three-stage analysis:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

450 U.S. at 252-53 (citations omitted). The Court specifically deliniated the nature of the burden and the party on whose shoulders it rested:

> The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.

450 U.S. at 253.

Further developing the three-stage analysis, the Court outlined the parties' respective burdens. In the first stage, "[t]he burden of establishing a prima facie case of disparate treatment is not onerous." The plaintiff must demonstrate

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[74] *Burdine* v. *Texas Dept. of Community Affairs*, 608 F.2d 563, 567 (5th Cir. 1979).

qualification for the position and rejection "under circumstances which give rise to an inference of unlawful discrimination."[75] The prima facie case produces a legally mandatory, rebuttable presumption of discrimination.[76]

Once the plaintiff's prima facie case generates a presumption of discrimination, the defendant is compelled to produce evidence, in the second stage, to rebut the presumption. The defendant may fulfill its burden of production with evidence sufficient to raise "a genuine issue of fact as to whether it discriminated against the plaintiff." To accomplish this, the defendant must come forward with admissible evidence that is legally sufficient to justify judgment in its favor. Thus, defendant is obligated to present evidence that discloses a legitimate reason for its action and frames the issue with sufficient clarity to enable the plaintiff to demonstrate pretext. At this point, "the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity." 450 U.S. at 255 (footnote omitted).

In the third stage, the plaintiff, retaining the burden of persuasion, must demonstrate that the proffered reason was not the true reason for the employment decision.[77] "This burden

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[75] 450 U.S. at 254. The scope of the plaintiff's burden in the first stage is at issue in United States Postal Service Bd. of Governors v. Aikens, No. 81-1044 (argued 11/9/82).

[76] The Board contends that "[n]o similar presumption of discriminatory motivation has been established in Board practice." (Bd. Br. 39 n.26). However, the *Wright Line* tests shifts the burden upon the General Counsel's establishment of a "prima facie case." *Burdine* recognized that the phrase "prima facie case" could mean both a presumption and sufficient evidence to infer the fact at issue. While *Wright Line* apparently uses the phrase in the later context, *Burdine* made it clear that, in the Title VII context, a prima facie case was tantamount to a presumption. 450 U.S. at 254 n.7.

[77] This is precisely the same burden that the Seventh Circuit, without regard to a three stage analysis, has imposed on the Board in NLRA cases. *NLRB* v. *Webb Ford*, 689 F.2d 733, 739 (7th Cir. 1982). *See also Firestone Tire & Rubber Co.* v. *NLRB*, 539 F.2d 1335,

(footnote continued on following page)

now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." 450 U.S. at 256. It may be discharged by rebuttal evidence or, without additional testimony, by discrediting the defendant's case through cross-examination.

In this manner, *Burdine* provides a meaningful formulation for refining the factual issues in a Title VII case and represents the culmination of a studied development of the issues.[78] Because the ultimate issue in a Title VII case—whether an employer has intentionally discriminated against an employee (or job applicant) by relying on prohibited reasons for an employment related action—is precisely the same as that involved in an NLRA discharge case, the *Burdine* analysis is uniquely suited to the NLRA context.[79] For this reason, the courts uniformally have found *Burdine* applicable to mixed motive discharges under the NLRA.[80]

(footnote continued from preceding page)

1337 (4th Cir. 1976) (Pre-*Wright Line* decision requiring the General Counsel to offer affirmative and persuasive reasons why the employer rejected the good reason and chose the bad one).

[78] *See also Bd. of Trustees of Keene State College* v. *Sweeney*, 439 U.S. 24 (1978); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978); *Teamsters* v. *United States*, 431 U.S. 324 (1977); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

[79] *See McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 803-04 (1973) (citing *NLRB* v. *Fansteel Metal Corp.*, 306 U.S. 240, 255 (1939)). *Cf. Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 769-70 (1976).

[80] *See Behring Int'l., Inc.* v. *NLRB*, 675 F.2d 83, 88-89 (9th Cir. 1982); *NLRB* v. *Wright Line*, 662 F.2d 899, 907 (1st Cir. 1981). In *Zurn Industries, Inc.* v. *NLRB*, 680 F.2d 683, 689 (9th Cir. 1982), the court, unlike the First and Third Circuits, did not require the Board to adopt the *Burdine* format:

> Although the *Burdine* approach would be a permissible implementation of the Act's purposes, we conclude that the *Mt. Healthy* approach used in the Board's *Wright Line* decision is within the Board's authority to adopt.

The Board contends that *Burdine* is inapposite for two reasons. First, the Board claims that "[t]he showing made by the General Counsel in order to sustain his burden under the *Wright Line* test is essentially the same as the Title VII plaintiff's conclusive proof of the ultimate finding of fact of the employer's discriminatory motive." (Bd.Br. 40). Second, the Board suggests that the only appropriate Title VII analogy to the *Wright Line* test is found in those decisions "that address the procedure to be used after a plaintiff establishes discrimination." (Bd.Br. 40). We will consider these issues in reverse order to supply the appropriate context.

2. The Title VII Remedial Phase Analogy.

In asserting that the *Wright Line* burden does not shift until the discharge hearing reaches a stage that resembles a Title VII remedial proceeding, the Board misconceives the thrust of this Court's Title VII doctrine. The Court has recognized that different theories potentially may apply to the infinite variety of factual patterns that can emerge under Title VII. The Board's argument confuses the application of these theories in the context of a single employee mixed-motive discharge case.

Burdine and its antecedents, beginning with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), apply to a situation in which an employer is alleged to have covertly relied upon a prohibited reason to treat the aggrieved party differently than others similarly situated.[81] The issues under consideration in

[81] A second line of cases, beginning with *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), concerns employer policies that are overtly discriminatory or "facially neutral" but discriminatory in their impact. In these circumstances, proof of discriminatory motive is not required: and the employer may avoid liability by establishing, through an affirmative defense, that the policy is justified by business necessity even though it is concededly discriminatory. *See, e.g., Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 143 (1977); *Donald* v. *Rawlinson*, 433 U.S. 321, 329 (1977); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 412-13 (1975). This line of cases presents a Title VII analogy to the Court's *Great Dane* approach in the NLRA context.

these decisions involved "the order and allocation of proof in a private, non-class action challenging employment discrimination." 411 U.S. at 800. Although those issues appear to have the most bearing on a single employee mixed-motive discharge, other theories of proof have been deemed acceptable to satisfy the prima facie burden in disparate treatment cases under Title VII. One of the theories of proof that has been recognized in this regard is the "pattern and practice" method.

When employed in a disparate treatment case, pattern or practice represents an effort to prove discriminatory motive by inference. Thus, in the liability phase of the proceeding, the plaintiff need not show that any employee or applicant was a victim of discrimination, but may establish a prima facie case by demonstrating that unlawful discrimination was a regular procedure or policy of the employer.[82]

When an unrebutted policy of unlawful discrimination is shown to exist, the liability phase is completed and relief for individual victims is sought in the remedial phase of the proceedings. At that point, usually the second half of a bifurcated trial, the burden of proof is "on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons."[83]

Here, the Board attempts to force a classic *Burdine McDonnell Douglas* private non-class action involving discriminatory treatment into the mold of the class action pattern and practice cases.[84] The critical flaw in the Board's argument is the fact that proof of anti-union animus in a single employee mixed motive discharge case bears no resemblance to proof of

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[82] *See generally Teamsters* v. *United States*, 431 U.S. 324, 360-62 (1977).

[83] *Teamsters* v. *United States*, 431 U.S. 324, 362 (1977); *see Franks* v. *Bowman Transporation Co.*, 424 U.S. 747, 773 n.32 (1976).

[84] *See Teamsters* v. *United States*, 431 U.S. 324, 362 (1972); *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 404 n.9 (1977); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772-73 (1976).

pattern or practice in a disparate treatment case. In the *Burdine* situation, as here, the question is whether protected activity was the real motive causing an employer to discriminate against a particular employee by discharging him; in the disparate treatment cases involving a pattern and practice theory of proof, the question is whether the employer's procedures over the course of time generally have involved unlawful discrimination.

Thus, the remedial phase of a Title VII case is not the same as the point at which the *Wright Line* burden shifts. In the remedial phase, the employer already has lost on the merits of its claim that its policies were not discriminatory, and the law of the case would preclude relitigation of those contentions. The sole question in the remedial phase is whether the discriminatory policies operated to damage a particular victim. Accordingly, the burden shifts to the employer to prove that they did not.[85]

The issue in this case is whether the discharge was in fact discriminatory. The Board's argument fails to recognize that under Title VII, unlike under the NLRA, "the questions of statutory violation and appropriate statutory remedy are conceptually distinct."[86] Under *Burdine*, the burden of proof does not shift until discrimination has been conceded or proven.[87] To shift the burden "before liability has been established would be

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[85] *See Patterson* v. *Greenwood School Dist. 50*, 30 FEP Cases 825, 826 (4th Cir. 1982).

[86] *Smith* v. *Secretary of the Navy*, 659 F.2d 1113, 1120 (D.C. Cir. 1981); *see Milton* v. *Weinberger*, 30 FEP Cases 913, 917 (D.C. Cir. 1982) ("A plaintiff whose *right* to protection from discrimination has been violated still may be denied a full *remedy*").

[87] Because the defendant in *Mt. Healthy* conceded that protected activity was part of the reason for the discharge, the burden of proof allocation in that case was consistent with a remedial proceeding under Title VII. The burden shift was used in *Mt. Healthy* as a mechanism for determining whether a remedy was appropriate, not, as the Board would use it here, to determine whether discrimination existed.

contrary to the well-established principle that the ultimate burden of persuasion remains at all times with the plaintiff."[88]

The Board's misunderstanding of the Title VII doctrine is confirmed by its failure to distinguish between the intermediate and ultimate burdens that an application of the Title VII decisions to this context would impose upon the General Counsel in order to justify reinstatement. Therefore, we turn to the substantive scope of the General Counsel's burden.

3. The Ultimate Burden: Dominant Motive.

Wright Line's assessment of the substantive scope of the General Counsel's burden of proof represents a misreading of *Mt. Healthy;* and the error is compounded by the Board's claim that the satisfaction of this standard constitutes proof of "the ultimate fact of discriminatory motive...." (Bd.Br. 40). *Mt. Healthy* required plaintiff to prove that the protected conduct was "a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him." 429 U.S. at 287. Despite the clear expression in *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 416 (1979), that the requisite burden of proof demanded evidence that "protected conduct played a substantial role in the employer's decision," the Board has chosen to ignore the substantiality requirement.

Rather than reading "motivating" as synonymous with "substantial", the *Wright Line* test equates proof that protected conduct was "a motivating factor" in the discharge with proof that it was "in part" the reason for the discharge. Thus, before *Wright Line*, the General Counsel was compelled to prove that protected activity was "in part" the cause of the discharge; now, he is required to prove protected activity was "a motivating factor" in the discharge. Despite paying lip service to *Mt. Healthy's* rejection of the "in part" test, the Board, through the use of word games, has offered a distinction without a difference.

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[88] *Milton* v. *Weinberger*, 30 FEP Cases 913, 917 (D.C. Cir. 1982).

In this case, it is imperative that deference be paid to Justice Frankfurter's admonition that, "[i]t is part of wisdom, particularly for judges, not to be victimized by words."[89] The history of mixed motive discharge cases in opinions of both the Board and the circuit courts indicates a fruitless search for talismatic terminology that, when measured against the evidence, will somehow magically divine the true reason for the discharge.[90] This has created a chaotic state in which confusion reigns among Board ALJ's; and neither employers nor union employees have reasonable guidelines to govern the manner in which they must conduct themselves. To correct this situation, it is essential to recognize that "formalism itself presents a danger, and cannot be a substitute for hard analysis".[91]

A mechanism designed to generate hard analysis in mixed motive discharge cases must begin with a clear division of the respective burdens of proof. Contrary to the Board's claim that the General Counsel's *Wright Line* burden is "comparable to what the Title VII plaintiff ultimately proves at the completion of the third step of the *Burdine* inquiry" (Bd.Br.40), reinstatement often has been ordered in:

> circumstances that are logically and temporally unrelated to the state of mind of the decisionmaker at the time of the discharge decision. Noncoercive expressions of union hostility, commission of other unfair labor practices, post-discharge declarations, knowledge of pro-union activities, inconsistent application of employment policies, and several rather than one explanation for discharge often serve in various combinations to create an unrebuttable basis for a finding of a partially discriminatory motive.[92]

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[89] *Shapiro* v. *United States*, 335 U.S.1, 56 (1948) (dissenting opinion). The concept evolved from Justice Holmes' observation that "[w]e must think things not words...." Holmes, *Law In Science And Science In Law*, 12 Harv.L.Rev. 443, 460 (1899).

[90] See authorities cited in notes 18 to 23 *supra*.

[91] *NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d 666, 670 n.4 (1st Cir. 1979).

[92] DuRoss, *supra* note 38, at 1128-30 (footnotes omitted).

Thus, the Board's historical practice discloses a burden of proof that resembles the Title VII plaintiff's intermediate burden rather than his ultimate burden.

As the Court recognized in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576 (1978):

> We think the Court of Appeals went awry, however, in apparently equating a prima facie showing under McDonnell Douglas with an ultimate finding of fact as to discriminatory refusal to hire under Title VII; the two are quite different and that difference has a direct bearing on the proper resolution of this case.

In fashioning an appropriate formulation for the resolution of mixed motive discharges, a clear division of the intermediate and ultimate burdens is necessary to promote "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." 438 U.S. at 577.

A division of the burden in the manner contemplated by the Title VII decisions will provide a framework of analysis that comes as close as any evidentiary system can to ascertaining the real motive behind the discharge. The General Counsel's intermediate burden would require proof that the protected activity was "a motivating factor" in the discharge. In *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666, 670 (1st Cir. 1979), Judge Aldrich outlined the manner in which that burden could be sustained:

> The first difficulty may be in deciding whether a bad reason existed at all, one step being whether the company had the requisite knowledge of union activity. Once that knowledge is established, the bad reason may be shown by independent evidence, or by the circumstances of the discharge itself. On rare occasions an employer may even admit to unlawful motivation, but the usual case of independent proof is by showing other acts apart from the discharge that indicate unlawful antiunion animus. Suspicions arising from the fact that a union supporter was fired

> in itself are not enough. Nor is employer gratification arising from realization that its action will harm the union. Dislike of unions is not uncommon among employers, and not only do principles of free speech permit it to be voiced, but so does section 8(c) of the Act.
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> * * *
>
> Rather, the employer must have exhibited opposition not merely to the union, but to lawful activity by its employees in pursuit of their objectives. We note, moreover, that other labor law violations do not "'automatically make a discharge an unlawful one.'"
>
> * * *
>
> The circumstances must be viewed as a whole.

(footnotes and citations omitted).[93]

Once the General Counsel introduces admissible evidence of this nature to demonstrate that protected activity was a motivating factor for the discharge,[94] a prima facie case would be established and the employer, consistent with *Burdine*, would be presented with two options: discredit that evidence or carry a burden of production. Under the second option, the employer would be compelled to come forward with evidence that it had a legitimate reason for the discharge.[95]

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[93] To the extent that *Eastern Smelting* can be read to impose a burden of proof on the employer, it was overruled—but only in that narrow vein—in *NLRB* v. *Wright Line*, 662 F.2d 899, 905 n.10 (1st Cir. 1981).

[94] It is worth noting that the prima facie case cannot be built upon evidence of protected anti-union speech. *See, e.g., NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969); *NLRB* v. *Colvert Dairy Products Co.*, 317 F.2d 44, 46 (10th Cir. 1963); *Coppus Eng'r'g. Corp.* v. *NLRB*, 240 F.2d 564, 571 (1st Cir. 1957).

[95] While the scope of the burden is the same as that articulated in *Mt. Healthy*, it is a burden of production rather than persuasion because of its role in determining whether discrimination existed rather than, as in *Mt. Healthy*, in determining whether concededly

(footnote continued on following page)

To fulfill the statutory burden, the General Counsel should then be required to prove that the real reason for the discharge was the employee's protected activity. This, of course, can be established by demonstrating that the reason proffered by the employer was a pretext. As Judge Aldrich explained:

> If an employer asserts an obviously weak or implausible good reason, or one manifestly unequally applied, this may support an inference that there was a bad reason. But where the burden is on the Board, except in such clear cases the mere fact that the Board considers the asserted good reason less than compelling will not suffice. . . .[96]

Because "the Board all too often has either disregarded altogether the valid reasons for the employer's conduct, or has labeled the good reason pretextual, although it was apparent that it was a good reason of substance,"[97] we believe that the General Counsel's ultimate burden should require him to show that the employee's protected activity was the employer's "dominant" motive for the discharge. Whether it is characterized as a dominant, primary or superior motive, the degree of anti-union animus necessary to satisfy the ultimate burden must be expressed in such terms as to assure that the fact-finder searches for the true motivation of the employer.

(footnote continued from preceding page)

existing discrimination should be punished. See note 87 *supra*. The nature of the showing necessary to transfer the *Mt. Healthy* burden in a non-NLRA case is at issue in *Connick* v. *Meyers* (No. 81-1251) (argued 11-8-82).

[96] *NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d 666, 670-71 (1st Cir. 1979); *see NLRB* v. *Charles Batchelder Co., Inc.*, 646 F.2d 33, 43 (2d Cir. 1981) (Newman, J., concurring).

[97] *NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d 666, 671 (1st Cir. 1979). *See also* DuRoss, *supra* note 38, at 1130: "Indeed, a violation will be inferred unless the asserted cause for discharge is not pronounced "trivial", no evidence of union animus is apparent, and the employer has little or preferably no knowledge of the dischargee's pro-union activity". (footnote omitted).

If the intermediate-ultimate burden dichotomy is to serve the important analytical function that *Burdine* intended it to have, the scope of the respective burdens must be defined. While the intermediate burden may be satisfied upon a showing that the protected activity was a motivating factor in the discharge, the evidence admitted on management's behalf to meet the prima facie case, if credited, will restore the equipoise. There will be two motives for the discharge in evidence; and the party that carries the burden must establish that the "bad" reason predominated.

In order to sharpen the analysis, the substantive scope of the General Counsel's ultimate burden should require proof that the employee's protected activity supplied the employer's dominant motive for the discharge. The reasons that gave rise to a dominant motive test correspond to the rationale of *Mt. Healthy;*[98] and the lower courts' subsequent retreat from dominant motive principles has been based upon the erroneous assumption that *Mt. Healthy* created a "but for" test.[99] However, as we have shown, the constitutional test of causation

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[98] *See NLRB* v. *Lowell Sun Publishing Co.*, 320 F.2d 835, 842 (1st Cir. 1963)(Aldrich, J., concurring):

> Where a party has two motives, one permissible and the other impermissible, the better rule is ... that the improper motive must be shown to have been the dominant one. Otherwise there is a danger that knowledge that something will have a pleasing result will be confused with, and substituted for, actuating motive. This is a particular danger in labor cases because once an anti-union animus has been shown it is always easy, no matter how valid a proper cause for discharge may have existed, to say that "one" of the motives was the animus. This would lead to what we believe occurred here, that a militant union man would feel that he could safely behave as he chose.

(citations omitted). *Mt. Healthy* used similar language to reject an "in part" test. 429 U.S. at 285-86.

[99] *See NLRB* v. *Wright Line*, 662 F.2d 899, 903 (1st Cir. 1981) ("In cases since *Mt. Healthy*, we have relied on its expression of the 'but for' standard, abandoning our earlier 'dominant motive' language.").

developed by *Mt. Healthy* was predicated upon analogous authorities that had rejected a "but for" test. Thus, *Mt. Healthy's* requirement that the discharge be substantially motivated by protected activity is consistent with an ultimate burden demanding proof of a dominant motivation.[100]

The functional utility of a dominant motive approach is confirmed by Wigmore's concept of "equipoise":

> [A] 'prima facie' case ... need not be overcome by a preponderance of the evidence, or by evidence of greater weight; but the evidence needs only to be balanced, put in equipoise, by some evidence worthy of credence; and, if this be done, the burden of the evidence is met and the duty of producing further evidence shifts back to the party having the burden of proof. . . .[101]

To overcome the "equipoise" which, almost by definition, applies to a dual motive discharge case in which two reasons—one acceptable and one condemned—caused a discharge, it is incumbant upon the party who carries the burden to affirmatively show that the prohibited reason was the real reason for the discharge. The most sensible analytical approach to disengage the equipoise is provided by resort to consideration of the dominant motive.

Finally, dominant motive analysis will facilitate the judiciary's ability to discharge its function of confining administrative agencies to their statutory limitations. In the Administrative Procedure Act, Congress specifically authorized the courts to guard against the arbitrary exercise of administrative discretion[102] and the use of conclusions drawn from unsup-

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[100] *See* DuRoss, *supra* note 38, at 1112-13.

[101] J. Wigmore Evidence § 2487, at 282 (3d ed. 1940); *see NLRB v. Transportation Mgt. Corp.*, 674 F.2d 130, 133 (1st Cir. 1982) (Breyer, J., concurring) ("the Board and court apparently do not agree about who should win if, after both sides have submitted their evidence, the evidence is in 'equipoise.").

[102] 5 U.S.C. § 706.

ported inferences.[103] The legislative history of Taft-Hartley confirms the import of these principles in the NLRA context. Nonetheless, under existing Board practices "the stated reasons for unlawful discharge conclusions currently rest in material part on inferences drawn from circumstances, such as after-the-fact declarations, which are neither probative of the employer's motive at the time of the discharge decision nor strictly related to the employer-employee predischarge relationship. Because these reasons are unrelated to the elements of the statutory violation, such explanations do not have a rational basis in law and thus fail to conform to [the Administrative Procedure Act]. Adoption of the dominant motive standard will directly encourage rational decisions and thereby assure adherence to this statutory requirement."[104]

Thus, dominant motive analysis will put in practice this Court's acknowledgement of the undisputed principle that "the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons that . . . intimidation and coercion."[105]

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[103] 5 U.S.C. § 557(c)(3).

[104] DuRoss, *supra*, note 38, at 1131 (footnote omitted).

[105] *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937).

CONCLUSION

For these reasons, the judgment of the Court of Appeals should be vacated and the case remanded to that Court with instructions to return it to the Board for a determination of whether (1) the General Counsel satisfied his intermediate burden of proving that the employee's protected activity was a motivating factor for the discharge; (2) the employer came forward with sufficient evidence to put the prima facie case in equipoise; and (3) the General Counsel discharged his ultimate burden by proving that the protected activity was the dominant motive for the discharge.

Respectfully submitted.

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